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IN THE

# Supreme Court of the United States

**October Term, 1975**

**No. 75-1788**

CAREY TRANSPORTATION, INC.,

*Petitioner,*

*against*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Authorities | ii |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 3 |
| Constitutional Provision Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 7 |
| 1. The decision below leaves toll collectors free from the constraints of the United States Constitution applicable to other governmental bodies | 7 |
| 2. The Court of Appeals misconceived the applicable standards for reviewing the Authority's classification under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution | 9 |
| Conclusion | 13 |
| Appendices: | |
| A—Opinions of the Court of Appeals | A 1 |
| Decision of the Appellate Division | A 15 |
| Opinion of the Supreme Court | A 16 |
| B—Judgment on Remittitur | B 1 |
| Order Amending Remittitur | B 4 |

## TABLE OF AUTHORITIES


PAGE

***Cases:***

*Atchison T. & S. F. R. Co.* v. *Vosburg,* 238 U.S. 56 (1915) ..... 10

*Bullock* v. *Carter,* 405 U.S. 134 (1971) ..... 13

*Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) ..... 9

*Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540 (1902) ..... 9–10

*F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920) ..... 12

*Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U.S. 150 (1897) .... 9

*Hartford Co.* v. *Harrison,* 301 U.S. 459 (1937) ..... 10

*Kentucky Finance Corp.* v. *Paramount Auto Exchange,* 262 U.S. 544 (1923) ..... 10

*Mayflower Farms* v. *Ten Eyck,* 297 U.S. 266 (1936) .... 10

*McGowan* v. *Maryland,* 366 U.S. 420 (1961) ..... 10

*Morey* v. *Doud,* 354 U.S. 457 (1957) ..... 10

*Power Co.* v. *Saunders,* 274 U.S. 490 (1927) ..... 10

*Rogge* v. *United States,* 128 F. 2d 800 (9th Cir. 1942) 9

*Sands* v. *Manistee River Imp. Co.,* 123 U.S. 288 (1887) ..... 9

*Smith* v. *Cahoon,* 283 U.S. 553 (1931) ..... 10, 13





PAGE

***Statutes:***

23 U.S.C. §103 ..... 8

28 U.S.C. §1257(3) ..... 2

N.Y. Public Authorities Law §§550-571 ..... 3

N.Y. Public Authorities Law §566 ..... 7–8

***Law Reviews:***

*Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969) ..... 10

Gunther, *The Supreme Court, 1971 Term—Foreword: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972) ..... 10

Nowak, *Realigning The Standards Of Review Under The Equal Protection Guarantee — Prohibited, Neutral and Permissive Classifications,* 62 Geo. L. J. 1071 (1974) ..... 10

***Miscellaneous:***

Federal Highway Administration, U. S. Department of Transportation, "Toll Facilities in the United States, Bridges, Ferries, Tunnels, Roads, as of January 1, 1973," Table T-1, Part 3 ..... 8

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CAREY TRANSPORTATION, INC.,

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TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Carey Transportation, Inc. ("Carey"), prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York rendered in this case on January 15, 1976 and entered on March 16, 1976 in the Office of the Clerk of New York County (Appendix B, *infra*, p. B1).

## Opinions Below

The majority and concurring opinions of the New York Court of Appeals are reported at 38 N.Y. 2d 545, 381 N.Y.S. 2d 811, 345 N.E.2d 281 (1976) (Appendix A, *infra,* pp. A1-A14). The decision of the Appellate Division of the New York Supreme Court, First Judicial Department, affirming, on the opinion below, the orders and judgments of the Justice at Trial Term of the New York Supreme Court, County of New York, is reported at 47 App. Div. 2d 610, 366 N.Y.S. 2d 361 (1975) (Appendix A, *infra,* p. A15). The opinion of the Justice at Trial Term of the New York Supreme Court, County of New York, is reported at 77 Misc. 2d 671, 355 N.Y.S. 2d 60 (Sup. Ct. 1974) (Appendix A, *infra,* pp. A16-A23).

## Jurisdiction

The order of the New York Court of Appeals was rendered on January 15, 1976 and entered on March 16, 1976 in the Office of the Clerk of New York County. The time for filing for writ of certiorari was extended to and including June 11, 1976 by the March 29, 1976 order of Hon. Thurgood Marshall, Associate Justice of this Court. The jurisdiction of this Court to review the judgment of the Court of Appeals of New York is invoked under 28 U.S.C. §1257(3).



## Question Presented

Are the toll rate classifications established by Triborough Bridge and Tunnel Authority ("Authority"), as applied to Carey, invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

## Constitutional Provision Involved

The Fourteenth Amendment, Section 1, to the Constitution of the United States provides, in pertinent part, as follows:

> ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

## Statement of the Case

Carey operates bus routes between points in the Borough of Manhattan, on the one hand, and, on the other, John F. Kennedy International Airport and LaGuardia Airport, all in New York City. It carries all members of the public desiring to use its services to travel between the points on its routes.

Carey's routes are operated pursuant to franchises granted to it by the City of New York. The City franchises require that Carey's bus routes use facilities owned and operated by the Authority, a public benefit corporation existing under Sections 550-571 of the New York Public Authorities Law.*

* The facility primarily pertinent is the Queens-Midtown Tunnel (the "Tunnel"), although toll charges collected at other Authority facilities are also at issue in this litigation.

This litigation had its genesis in 1962 when the Authority amended its schedule of tolls for the use of the Tunnel to differentiate between two-axle "franchise buses where authorized" and two-axle buses other than franchise buses. The latter category was charged twice the rate of the former. Subsequently, the Authority amended its toll schedule to provide that the lower toll rate should only apply to two-axle franchise buses "engaged in general transportation . . . ." By footnote, the Authority created a specific exclusion from this category by providing that "[f]ranchise buses engaged in general transportation do not include airline buses or other special buses which may use franchised routes."

The Authority has placed Carey's franchise buses in the classification "airline buses or other special purpose buses which may use franchised routes" and, accordingly, has applied and continues to apply the higher toll rate to Carey's franchise buses while applying the lower toll rate to other franchise buses.

Carey, after protesting the denial to it of the lower tolls, commenced this action in which it sought (1) a judgment declaring that the Authority's toll classifications, as applied to it, were illegal and unconstitutional, (2) an injunction restraining the Authority from imposing and collecting the higher tolls from it and (3) an award of damages in an amount which represented the difference between the higher tolls collected from Carey and the lower tolls which Carey claims should have applied to it.

The constitutional issues sought to be reviewed in this Court were first raised by Carey in its complaint by the request that the Authority's classification be declared "illegal and unconstitutional," and subsequently reiterated in a supplemental and second supplemental complaint. Carey further asserted the denial of equal protection of the laws in the memoranda of law submitted to the Trial Court.



The action was submitted to the Trial Court upon an Agreed Statement of Facts. The Trial Court rendered a decision (Appendix A, *infra*, pp. A16-A23) in which it held that the Authority's classification of tolls was not based upon a "real and substantial distinction bearing a reasonable and just relation to the things in respect to which" the classification was imposed (Appendix A, *infra*, p. A21). Accordingly, the Court found the Authority's refusal to apply the lower toll rate to Carey to be "illegal, arbitrary, unreasonable, discriminatory and unconstitutional" (Appendix A, *infra*, p. A23). A permanent injunction was granted to Carey as well as a money judgment in the sum of $677,450.58.

In the Appellate Division, Carey, as respondent, again asserted in its brief that the Authority's toll classification constituted an unconstitutional denial of equal protection of the laws. The Appellate Division unanimously affirmed the orders and judgments below on the opinion of the Trial Court.

The Court of Appeals granted the Authority leave to appeal. On the appeal Carey, again as respondent, asserted the violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals unanimously reversed the order of the Appellate Division, vacated the orders and judgments

of the Trial Court, and granted judgment in favor of the Authority. In so doing, the Court of Appeals wrote two opinions. The majority found that the Authority, acting "much like an entrepreneur," was even less limited than a tax collector in classifying the users of its facilities for toll-charging purposes. Moreover, the majority held that since the New York Legislature empowered the Authority to fix toll rates "without limitation," the classification would be upheld notwithstanding the lack of justification for the Authority's principal proffered distinctions.

The concurring opinion recognized that toll-fixing entities such as the Authority were subject to the restrictions of the Equal Protection Clause of the Fourteenth Amendment and were not to be tested by standards applicable to tax-collectors, but, applying a somewhat less unlimited standard of review than the majority, nevertheless found a conceivable basis to uphold the Authority's classification.

Although the Court of Appeals' majority opinion does not discuss Carey's equal protection arguments, the Court, in granting Carey's motion to amend the remittitur, held as follows (Appendix B, *infra,* p. B5):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the toll rates established by the Triborough Bridge and Tunnel Authority, as applied to Carey Transportation, Inc., were invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, in passing upon this contention, held that the toll rates, as so construed and applied, were constitutionally valid."



## Reasons for Granting the Writ

### 1. The decision below leaves toll collectors free from the constraints of the United States Constitution applicable to other governmental bodies.

The majority opinion of the New York Court of Appeals would test the actions of the Authority by standards applicable to private entrepreneurs rather than standards applicable to State agencies.

Carey respectfully submits that the Court of Appeals' "entrepreneurial" standard, eliminating, as it does, the judicially enforceable protections granted by the Fourteenth Amendment, is inherently dangerous as a guide for governmental agencies, including the Authority, having toll fixing and collecting powers. The area of danger is found in the language of the Court of Appeals itself. Speaking of the power of the Legislature to correct abuses which might occur, Judge Breitel says: "The courts are not, however, appropriate to make such correction, if the Legislature has chosen to confer unfettered discretion. . . ." (Appendix A, *infra*, p. A8). Such rejection of judicial oversight clearly spells the end of equal protection of the laws insofar as State action in the toll-making area.

The Court of Appeals' holding is bottomed on a mistaken premise. Contrary to its *ipse dixit,* neither the Authority nor its toll-fixing and toll-collecting counterparts throughout the Nation are private entrepreneurs. As to the Authority, the New York Legislature has clearly stated that it is performing a governmental function:

> "It is hereby found, determined and declared . . . that the . . . [Authority] will be performing an essential

> governmental function in the exercise of the powers conferred upon it by this title . . . ." (N. Y. Public Authorities Law §566)

Moreover, the Federal Secretary of Transportation, acting pursuant to 23 U.S.C. §103, has designated the Tunnel as an integral part of the United States Interstate Highway System as a connection to Interstate Route 495 (Federal Highway Administration, U.S. Department of Transportation, "Toll Facilities in the United States, Bridges, Ferries, Tunnels, Roads, as of January 1, 1973," Table T-1, Part 3) (hereinafter "FHA, USDOT, Toll Facilities"). It is obvious that the Authority, operating, as it does, a vehicular tunnel between two boroughs in the Nation's most populous city, is performing a governmental function and must be subject to the constitutional limitations applicable to other governmental agencies.

The implications of the Court of Appeals' decision will undoubtedly be felt throughout the Nation since, as of January 1, 1973, there were 227 bridge, tunnel and highway toll facilities in the United States which were operated by public authorities or other governmental agencies (FHA, USDOT, Toll Facilities). The number of toll facilities and the magnitude of tolls are destined to grow, and the possibility of abuse increased, as debt-ridden governmental entities search for new sources of revenue and environmentalists seek to discourage vehicular traffic in certain areas. The courts cannot leave this vital function "unfettered" and free of judicial scrutiny.

Presumably in recognition that its holding that the Authority is to be judged by standards applicable to a private



entrepreneur rather than to a governmental agency is tenuous, the majority opinion seeks alternatively to give the Authority the status of a tax collector and thereby to broaden the discretion to which it is entitled. However, it has long been established that tolls are not taxes (*Sands* v. *Manistee River Imp. Co.*, 123 U.S. 288, 294 (1887); *Rogge* v. *United States*, 128 F. 2d 800, 802 (9th Cir. 1942)). As pointed out in the concurring opinion of the Court of Appeals (Appendix A, *infra*, pp. A12-A14), the power of the Authority to classify can not be expanded merely by labeling it something it is not. The demands of the Equal Protection Clause may not be so easily avoided.

**2. The Court of Appeals misconceived the applicable standards for reviewing the Authority's classification under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.**

The Authority, as a creature of the State and performing a governmental function, is subject to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Contrary to the ruling of the Court of Appeals, governmental bodies are not free arbitrarily to discriminate among similarly situated persons irrespective of whether the classification is concerned with economic or commercial regulation or individual rights. This Court has consistently struck down State action in the economic and commercial spheres where the means adopted bear no meaningful relationship to the ends sought to be achieved. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U.S. 150 (1897); *Connolly* v. *Union*

*Sewer Pipe Co.*, 184 U.S. 540 (1902); *Atchison T. & S. F. R. Co.* v. *Vosburg*, 238 U.S. 56 (1915); *Kentucky Finance Corp.* v. *Paramount Auto Exchange*, 262 U.S. 544 (1923); *Power Co.* v. *Saunders*, 274 U.S. 490 (1927); *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266 (1936); *Hartford Co.* v. *Harrison*, 301 U.S. 459 (1937); *Morey* v. *Doud*, 354 U.S. 457 (1957).

The Court of Appeals in the case at bar, to the extent it felt the Equal Protection Clause applicable at all, attempted to apply the "any conceivable basis" test enunciated by this Court in *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961) —a test which has been strongly questioned and rightfully equated to an almost total abandonment of court review of classifications in the commercial and economic areas. *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1087 (1969); Gunther, *The Supreme Court, 1971 Term —Foreword: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-20 (1972); Nowak, *Realigning The Standards of Review Under The Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 Geo. L. J. 1071, 1074 (1974).

The Court of Appeals, however, expanded the "any conceivable basis" test far beyond *McGowan*. In applying it to the facts at bar, the Court first "conceived" that the purpose of the statute creating the Authority and empowering it to charge tolls was to regulate mass transportation by preferring (through the granting of lower toll charges) one terminus (*e.g.*, an apartment complex) over another (*e.g.*, an airport). Nothing in the legislation supports that premise. Indeed, it is clear that the purpose of the statute



was to construct a facility and to collect tolls for its financing and operation. The fact that after 1968 (*i.e.*, more than four years after the commencement of the period in suit) surplus funds could be used for other purposes is hardly support for the proposition that the Legislature intended mass transportation regulation or subsidization as a purpose of the creation of the Authority. It is, rather, evidence of a precisely contrary original intent. Otherwise, an amendment authorizing the transfer of surplus funds would not have been required.

Having thus conceived the purpose of the statute creating the Authority, the Court of Appeals then concludes that the charging of a higher toll rate to franchised buses serving airports than to franchised buses serving other points is "not utterly arbitrary and unsupported by economic or public policy goals, as it (the Authority) reasonably conceives them." But, there is not an iota of evidence in the record to support this determination. The record is totally barren of a single factual consideration taken into account by the Authority at the time the classification at issue was promulgated. Moreover, the record does not even contain any declaration by the Authority of its reasons or rationale for the classification.

The absence of any factual support in the record is fatal. Carey submits that an analysis of airline flight schedules would show that the heaviest airport traffic is at the peak-rush hours. Thus, it is equally important to encourage a greater use of airport buses by airline passengers who might otherwise resort to private vehicles or individual taxicabs during such peak-rush hours as to encourage the

use of "commuter" buses. If the Court permits a classification to stand in the absence of any evidence of distinction related to the end sought to be accomplished, it has totally abandoned the concept of equal protection of the laws. No matter how limited a review of State action in the economic area is advisable, something more than rank speculation must be required.

The majority opinion apparently concedes that the principal reasons belatedly proffered by the Authority for the challenged classification (but for which there is no basis in the record) are not real:

> "Carey quite rightly points out that neither the nomenclature, the definitions, nor the scale of fares apply uniformly to the members of the two classes of bus operations. The Authority can hardly justify its differentials on a mass transportation hypothesis for, to be sure, special purpose buses in general, and an airport carrier in particular, serve species of mass transportation. Moreover, special commuter buses, both privately and publicly owned, qualify for the lower tolls while operating between fixed points and charging relatively high fares." (Appendix A, *infra,* pp. A3-A4)

Carey submits that, in holding that a classification can stand in the absence of any support in the record for distinction, the Court of Appeals has, in effect, abolished the Equal Protection Clause. If courts are not "appropriate" to judge if "all persons similarly circumstanced shall be treated alike" (*F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920)), who is? And if no one is, the unfettered Legislature might well create exactly the invidious



classifications which the Equal Protection Clause is designed to avoid.

We have here a classification without a stated basis—a classification based solely upon the termini of buses which bears no relation whatsoever to the standard criteria for toll classification, *i.e.,* size or weight of vehicle, number and size of wheels, number of axles, load, frequency of use, passengers carried or carrying capacity, or any other element related to wear and tear of roads, safety or cost of maintenance and repair. In short, the Authority's classification has no reasonable relation to an announced purpose nor to the commonly accepted reasons or purposes of toll collection. As such, the classification is invalid. *Smith* v. *Cahoon,* 283 U.S. 553 (1931); *Bullock* v. *Carter,* 405 U.S. 134 (1971).

If there is any viability to the Equal Protection Clause in the area of economic or commercial regulation, the Authority's arbitrary classification must be invalidated.

## Conclusion

**It is respectfully submitted that this petition for writ of certiorari should be granted.**

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# APPENDICES

## Appendix A

### Opinions of the Court of Appeals

January 15, 1976

STATE OF NEW YORK

COURT OF APPEALS

No. 566

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CAREY TRANSPORTATION, INC.,

*Respondent,*

*v.*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Appellant.*

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Chief Judge BREITEL. In this declaratory judgment action brought by a franchised airport omnibus line, Carey, it attacks as unlawfully discriminatory bridge and tunnel toll rates imposed by the Authority. Defendant is a public authority created by the State to build, operate, and maintain various tunnels and bridges crossing the waterways separating parts of New York City. It is empowered by statute to fix its tolls and charges. Carey once sought in the action to apply principles of equal protection of the law but now, less ambitiously, would have applied standards of rate fixation, like those imposed by regulatory authorities upon regulated enterprises. On an agreed statement of facts, the action has thus far resulted in a Supreme Court judgment in favor of Carey, both declaratory and monetary, in the sum of $677,450.58, which the Appellate Division affirmed.

The issue is whether the Authority in fixing toll rates for the use of its facilities was empowered to distinguish between what it denominated and defined as general purpose franchised omnibus operations and special purpose franchised bus operations, and, based on this distinction, to charge higher tolls for the special purpose buses.

There should be a reversal, a declaration in favor of defendant, and a vacatur of the money judgment. The Authority is a governmental enterprise whose purpose is to operate its tunnels and bridges on economic principles, just as any entrepreneur might. Its charges and tolls were not and are not regulated by statute, or by regulatory authority, such as the Public Service Commission or such as the New York City Board of Estimate in its franchise-granting responsibility. The Legislature lawfully empowered the Authority to fix rates, without limitation, assuming no doubt that economic and political forces would control the exercise of the toll-charging function, subject always to legislative correction if the power were abused. It therefore could charge higher tolls to differentially classified tunnel and bridge users.

The thrust of Carey's position is that, although it is a franchised public carrier, it is not charged the same toll rates as are some other franchised public carriers. Particularly, Carey argues that tolls or charges must be related to the physical use of the Authority's facilities and that in setting the tolls, the Authority must disregard whence the buses come, where they go, or the purpose of their travel.

Since 1936 the Authority has permitted a reduced rate for certain franchised public carriers. And since 1962 its



rules and regulations have distinguished between "general purpose" buses and "special purpose" buses. General purpose buses, as the Authority defines them, are those franchised buses which are engaged in "general transportation" of the public. Only general purpose buses, which include some privately owned buses, qualify for lower rates. The Authority has classified as special purpose buses those, such as Carey's, which travel between fixed stations to and from the airports. Other special purpose buses include those which carry members of the public between more or less fixed stations to and from beaches, raceways, and sports stadiums.

It is noteworthy that the tolls charged over the years to the special purpose buses have not been great, generally about twice as much as that charged the so-called general purpose buses, that is, 50 cents rather than 25 cents, and correspondingly in recent years as the tolls have been substantially increased.

The Authority defends its differential rates on the ground that it charges lower rates to general purpose franchised buses, both publicly and privately owned, because of its duty to encourage mass transportation. Variously, the Authority has argued that the special purpose buses operate between fixed points and charge higher fares than are charged on general purpose buses.

Carey quite rightly points out that neither the nomenclature, the definitions, nor the scale of fares apply uniformly to the members of the two classes of bus operations. The Authority can hardly justify its differentials on a mass transportation hypothesis for, to be sure, special purpose

buses in general, and an airport carrier in particular, serve species of mass transportation. Moreover, special commuter buses, both privately and publicly owned, qualify for the lower tolls while operating between fixed points and charging relatively high fares.

Nevertheless, the assumption underlying Carey's argument is without basis. Carey somehow assumes that the Authority's rates are subject to standards based on a "fair return on investment" or uniformity of rates charged the public, applicable in utility regulation. It argues that the courts must act in the absence either of a legislative standard or of regulation of the Authority's rates by another regulatory public body. This argument assumes that tolls and charges must be uniform and must represent only an allocation of the cost of construction, maintenance, and repair of the physical facilities.

Both litigants unduly complicate the issue. The question is simply whether the Authority in the operation of its facilities may fix tolls and charges which in its judgment will best serve its economic goals and public policy goals, including economic differentiation among its charges so long as there is not involved any of the invidious discriminations condemned by statute or Constitution, or some utterly arbitrary discrimination not related to economic considerations or some accepted public goal.

A privately owned public utility, such as a railroad or electric plant, requires public regulation, politically and economically, and even at common law a privately owned public utility such as a common carrier was required to charge uniform rates (see, e.g., *Hewitt* v. *New York, New*



*Haven & Hartford R.R. Co.*, 284 NY 117, 122). A publicly owned utility, of which the Authority is an example, is in no such situation. The fare history of the publicly owned subways in New York City is as good an example as any (cf. *Klein* v. *O'Dwyer*, 192 Misc 421, 425-426 [Hecht, J.]). But of course the Legislature may and often does impose standards or regulation by other public bodies on publicly owned utilities (e.g., Public Authorities Law, §1029, subd 3 [Albany Light, Heat and Power Authority]; Village Law, §§12-1202, 12-1208; Public Service Law, §66, subd 5; see *Matter of Village of Boonville* v. *Maltbie*, 272 NY 40, 47-49).

At times, with respect to "unregulated" public authorities, the standard provided is with the intention that the enterprise not be profit making (Public Authorities Law, §153, subd 10; §153-b, subd 5; §153-c [Jones Beach State Parkway Authority]; §1005, subds 5, 6; see §§1001, 1001-a, 1014 [Power Authority of State of New York]). But more often the standard is relatively undefined, requiring only that charges be sufficient to cover expenses and obligations to bondholders or other creditors, if any (see, e.g., Public Authorities Law, §578, subd 10 [Thousand Islands Bridge Authority]; §703, subd 9; §703-b [Ogdensburg Bridge Authority]; §1054, subd 15 [Erie County Water Authority]). And at other times there is no standard imposed at all (see, e.g., §654, subd 13 [Nassau County Bridge Authority]; §828, subd [e] [Central New York Regional Market Authority]; §879, subd 12 [Genesee Valley Market Authority]).

Carey makes something of the argument that there has been an improper delegation of power to the Authority, if its toll-fixing power is substantially untrammeled. His-

torically rate fixing is a legislative power which the Legislature may delegate (e.g., *Matter of Village of Saratoga Springs* v. *Saratoga Gas, Elec. Light & Power Co.,* 191 NY 123, 146-151; see *Meyers* v. *New York State Div. of Housing & Community Renewal,* 36 AD2d 166, 170-171). It is not to be confused with the delegation of other governmental powers which, if delegated, must be confined by limiting standards (see, e.g., *Packer Collegiate Inst.* v. *University of State of N. Y.,* 298 NY 184, 189-191).

The resolution of the issue must therefore be developed by examining the history and legal structure under which the Authority was created and functions.

In *New York City Tunnel Auth.* v. *Consolidated Edison Co. of N. Y.* (295 NY 467, 476) this court stated that an authority, in setting and collecting charges for the use of its facilities, was engaged in a governmental function which therefore did not require it to compensate privately owned public utilities for displacement of their cables, pipes, and the like. In so holding the court in dictum commented, perhaps not with meticulousness, that in exercising a toll-fixing power it was exercising a taxing power to carry the cost of the improvement.

Assuming, doubtfully, that this be true, then the scope of classification is broad indeed and need not follow the restrictive tests associated with other forms of rate charging (see *Ampco Print.-Advertisers' Offset Corp.* v. *City of New York,* 14 NY2d 11, 24, app dsmd 379 US 5). As this court stated in *People ex rel. Hatch* v. *Reardon* (184 NY 431, 445, affd 204 US 152) "[a]rbitrary selection and discrimination characterize the history of [tax] legislation." This is subject to the limitation that a tax classification



will not be sustained where "'so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it'" (*Matter of Keeney,* 194 NY 281, 286). There is a great body of authority sustaining distinctions no less exact or perfectly defined than those involved in this case (e.g., *Matter of Roosevelt Raceway* v. *County of Nassau,* 18 NY2d 30, 38-40; see, also, *New York R. T. Corp.* v. *City of New York,* 303 US 573, 578, 581-586, affg 275 NY 258). This is on the view, *arguendo,* that tolls charged by an authority are akin to taxes. A more refined analysis, however, suggests that as a toll collector, the Authority is more akin to an entrepreneur than a tax collector, in which event it is even less limited, if that were conceivably possible, in classifying the users of its facilities for toll-charging purposes.

The Authority in its original form was created in 1933 to construct the Triborough Bridge (L 1933, ch 145, § 3, subd 9). The New York City Tunnel Authority, a similar Authority initially responsible for both the Brooklyn Battery Tunnel and the Queens Midtown Tunnel, was created in 1936 (L 1936, ch 1). The two Authorities were eventually merged. The statutes then, and the surviving statute still empowers the toll-collecting Authority to establish and collect tolls for the use of the facilities it constructs and maintains (Public Authorities Law, § 553, subd 12).

The Authority statute has since 1939 provided how surplus funds should be used (L 1939, ch 874, § 2). Moreover, the Authority has always been authorized to use surplus funds derived from one project for its other project or projects. And since 1968 it may also transfer surplus

funds to the Metropolitan Transportation Authority or New York City Transit Authority (Public Authorities Law, § 553, subd 12). Hence, the Legislature has granted an unlimited toll-fixing power to the Authority with explicit provision for a surplus, and, indeed, since 1968, an expectation that at least a part of any surplus be used for subsidizing general mass transportation. This is strong support for the proposition that the Authority when acting in its toll-fixing capacity is to act much like an entrepreneur might, letting economic forces and the maximizing of profit be at least in part its guide.

This rather broad power is of course subject to legislative correction when abused. The courts are not, however, appropriate to make such correction, if the Legislature has chosen to confer unfettered discretion (see *Matter of Russell* v. *Jones Beach State Parkway Auth.*, 80 Misc 2d 698, 700). Moreover, the Legislature has responded with corrective legislation when correction was deemed necessary; one correction arising indeed in the very context of the facts presented in the *Russell* case (*supra*) (Public Authorities Law, § 153-c [Jones Beach State Parkway Authority]).

Since 1936 the Authority has granted lower tolls to certain franchised public buses, for an earlier period at the rate charged for private passenger motor vehicles. Although in establishing its toll classifications the Authority has had definitional problems, it has always been and still is clear that it charges a higher toll to franchised buses serving airports, beaches, raceways, and sports stadiums. Its difficulty has stemmed from its incapacity to distinguish



at an abstract level with meticulous definitions between such "special purpose" buses and others. But this difficulty does not circumscribe its unfettered discretion to fix tolls as it will so long as invidious illicit discriminations are not practiced and differentials are not utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them.

Assuming that somehow the Authority's power to set and collect rates must be exercised on some uniform basis within classes of users of its facilities, the Authority has not violated any principles of classification.

In many respects special purpose buses are distinguishable as the luxury subgroup of public franchised buses. Buses serving beaches, airports, raceways, and sports stadiums are associated with recreational travel or with high cost means of interurban, national, or international travel. True, they may not be distinguishable on the bases of the number of axles, availability to the public, limited or nonstop travel, or, in some few instances, the higher fares charged. The "special purpose" buses are, nevertheless, distinguishable. They are not vehicles in mass transportation simply to move passengers between their homes and places of work, visiting or shopping within the City of New York and its immediate environs. Beyond these general, that is, common, periodic, and often daily purposes the passengers do use the special purpose buses for the passenger's special purpose, most often without periodicity and at separated irregular time intervals.

The so-called general purpose buses, however a few of them may share some characteristics with the "special purpose" buses, are forms of mass transportation from place to place in the course of daily life, usually regardless of the

purpose of the passengers. This is so even if airport buses, or raceway buses for that matter, are also used to take some people periodically or even daily between their homes and their places of work at the airports or the raceways. To differentiate toll charges according to the purpose of most of the passengers is a permissible basis (cf. *Burton* v. *Monticello & Burnside Turnpike Co.,* 162 Ky 787, 794). A definition of class is not required to be so perfect that some members of the class may not depart from its definitional norms (see *Montgomery* v. *Daniels,* 38 NY2d 41, 61-62).

It is of significance, too, that Carey concedes, as it must, that the City of New York, in charging private bus lines franchise fees, usually a percentage of gross revenue, for use of its streets, negotiates and imposes differential charges. It does so both with respect to Carey and the other franchise operators with whom Carey demands equality of treatment by the Authority. Indeed, the parallel of separate negotiation extends to the permits that Carey and the other bus lines obtain to use the Authority facilities. Each of the permits is separately negotiated by the permit holder with the Authority, and each contains differential conditions, particularly with respect to schedules and headway between buses during rush and off hours. It is difficult to see why, if such differentials are valid and tolerable, differentials are not valid and tolerable with respect to bridge and tunnel tolls.

Finally, except for its ipse dixit, Carey does not show why tolls must bear some relation to the physical use of the Authority's physical facilities. This may represent no



more than a confusion with privately owned public utility rate regulation where constitution and statute require a fair return to the utilities, in which capital costs, however based, and unit cost of operation are ingredients in the rate-fixing formula (e.g., *Matter of General Tel. Co.* v. *Lundy,* 17 NY2d 373, 381-382). If Carey's position is based on the statutory language which authorizes tolls for the "use" of the Authority facilities, the reading is too restrictive. The language simply means that the toll is triggered by the use, and not otherwise, and offers no basis for inferring that the toll is to be cost related to the physical use. No one would suggest that toll highways could not impose a uniform charge for a long or short distance, or conversely, different charges for long and short distances, or that franchised privately owned public buses could not be limited or permitted to charge uniformly for a long or short distance, or conversely, as in many cities, charge varying fares for long and short distances. The factors are generally economic, related to what even amateur economists are acquainted with as the law of monopoly price, and of course with heavy weight are the factors based on a diverse range of public policies. Even railroad freight as well as passenger rates are often influenced by such factors and a single formula absolutely applied is never present in determining a rational uniformity of rates in rate regulation or rate fix: on. The same may be said about rates for air freight and air passengers, and for transportation by water, and indeed for the fares Carey or other franchised bus operators charge or are permitted to charge its passengers.

The short of it is that the issues in this case reduce themselves to misclassifications of the problems addressed and to a logomachy over definitions. The shallowness of the issues may well explain the six-year hibernation of this litigation, between 1966 when the action was begun and 1972 when it was reinvigorated.

Accordingly, the order of the Appellate Division should be reversed, with costs in all courts to appellant Authority, the orders and judgments of Supreme Court, New York County, vacated, and judgment granted in favor of appellant Authority declaring that the tolls and charges set and collected by the Authority with respect to plaintiff-respondent have been and are valid.

Cooke, J. (concurring). I concur in the result reached by the majority.

In essaying the validity of the Authority's classification of general purpose franchised bus operations and special purpose franchised bus operations, certain fundamentals must be kept in mind. The Triborough Bridge and Tunnel Authority, a public corporation (Public Authorities Law, §552; General Construction Law §§65, 66) created by the State (Public Authorities Law, art 3, tit 3; see L 1933, ch 145) and an agent of the State (*Bachmann* v. *New York City Tunnel Auth.*, 47 NYS2d 767, 769, affd 263 App Div 945, app dsmd 288 NY 707, cert den 317 US 675), is subject to the equal protection clause of the Fourteenth Amendment (*Burton* v. *Wilmington Parking Auth.*, 365 US 715; *Cooper* v. *Aaron*, 358 US 1, 17; *Pennsylvania* v. *Board of Trusts*, 353 US 230; cf. *People* v. *Ditniak*, 28 NY2d 74, 78). Equal protection does not require that all persons be dealt with



identically, but it does require that a distinction which is made have some relevance to the purpose for which the classification is established (*Baxstrom* v. *Herold*, 383 US 107, 111). If any state of facts reasonably may be conceived to justify the particular classification here employed, it must be upheld (*Matter of Association of Bar of City of N. Y.* v. *Lewisohn*, 34 NY2d 143, 156).

The classification of the Authority is not entitled to approval on the proposition that in exercising a toll-fixing power it was engaging in taxation and, therefore, arbitrary selection and discrimination were permissible, so long as the classification was not "so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it". This so so simply because tolls and taxes are not the same. In *Sands* v. *Manistee Riv. Improvement Co.* (123 US 288) the Supreme Court stated: "There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. The legislature, acting upon information received, may prescribe, at once, the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or boards appointed for that purpose, who may previously inspect the works, and ascer-

tain the probable amount of business which will be transacted by means of them, and thus be more likely to adjust wisely the rates of toll in conformity with that business. This subject, like a multitude of other matters, can be better regulated by them than by the legislature. * * * The whole subject is one of administrative regulation, in which a certain amount of discretionary authority is necessarily confided to officers entrusted with its execution. Should there be any gross injustice in the rate of tolls fixed, it would not, in our system of government, remain long uncorrected."

The majority states that "[t]o differentiate toll charges according to the purpose of most of the passengers is a permissible basis". If this is the basis and if it relates to the purpose for which the classification between the general purpose buses and special purpose buses was made, the distinction may be upheld (see *Smith* v. *Cahoon*, 283 US 553, 567). The congestion at the facilities of the Authority at peak hours, with its attendant delays, dangers and expense, and the lessening of these disadvantages, by encouragement of greater use of mass transportation by commuters, who otherwise might resort to private vehicles, add up to a conceivable reason justifying the classification.

Judges JASEN, GABRIELLI, JONES and FUCHSBERG concur with Chief Judge BREITEL; Judge COOKE concurs in result in a separate opinion in which Judge WACHTLER concurs.

Order reversed, with costs in all courts to appellant, the orders and judgments of Supreme Court, New York County, vacated, and judgment granted in favor of appellant Authority in accordance with the opinion herein.



**Decision of the Appellate Division**

APPELLATE DIVISION OF THE SUPREME COURT

FIRST JUDICIAL DEPARTMENT

February 11, 1975

New York County Clerk's Index No. 2374/72

CAREY TRANSPORTATION, INC.,

*Respondent-Appellant,*

*v.*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Appellant-Respondent.*

Order and judgment (one paper), Supreme Court, New York County, entered on May 24, 1974, and order and judgment (one paper) of said court entered on October 25, 1974, unanimously affirmed on the opinion of Carney, J., at Trial Term, without costs and without disbursements. No opinion. Concur—Stevens, J. P., Markewich, Capozzoli, Lane and Nunez, JJ.

**Opinion of the Supreme Court**

SUPREME COURT

TRIAL TERM, NEW YORK COUNTY

April 10, 1974

Index No. 2374/72

CAREY TRANSPORTATION, INC.,

*Plaintiff,*

*v.*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Defendant.*

GEORGE M. CARNEY, J. Plaintiff on May 13, 1966 commenced this action for a declaratory judgment, an injunction and damages. The action consists of two causes of action. Plaintiff in the first cause of action claims that the defendant Authority has refused to grant to it the lower toll rate granted to other users of its facilities and that said refusal is arbitrary, capricious, illegal, discriminatory and unconstitutional, and seeks an injunction restraining the Authority from continuance of its actions. In the second cause of action the plaintiff seeks as money damages the difference between the tolls actually paid by Carey and what the Authority should legally have required it to pay during the period involved. The parties have submitted the controversy upon an agreed statement of facts.



*Appendix A—Opinion of the Supreme Court*

The Authority contends that it has by law the power to make rules and regulations concerning the facilities which it operates, including rules and regulations establishing the tolls to be collected from vehicles using its facilities. It further claims that it was legally justified in excluding airline buses (Carey) from the benefits of the lower toll rate. It points to the toll rule which it established granting a 25-cent toll rate to "franchise buses engaged in general transportation" and the footnote to its toll rate rule which provides that "franchise buses engaged in general transportation do not include airline buses or other special purpose buses which may use franchise routes" (21 NYCRR 251.1). It contends that its own interpretation given to its own rule is entitled to great weight and is controlling in the absence of weighty reasons requiring its rejection. In this instance the Authority contends that there was a perfectly rational, reasonable basis for the rule. It claims that the buses classified as general transportation buses entitled to the lower toll were franchise buses which were serving the general public all along the route of the bus, by picking up and discharging passengers at designated bus stops, whereas the airline buses did not serve the public in this sense and merely picked up passengers at the airline terminal and brought them to Kennedy Airport or La Guardia Airport or transported them from the airport to the terminal and picked up no passengers in between.

Carey Transportation, Inc., is, and was during the period involved, a New York omnibus corporation organized pursuant to articles 1 and 5 of the Transportation Law. It operates two-axle buses. There are three bus routes

involved, each having been established pursuant to a franchise granted to Carey by the City of New York, each of which required Carey to transport the public between certain designated points, using certain facilities and routes.

During all of the period involved in this action, one was a route through the Queens Midtown Tunnel, between the East Side Airlines Terminal in Manhattan and the John F. Kennedy International Airport and La Guardia Airport in Queens.

From October 18, 1965 to November 15, 1967 there was a route via the Bronx-Whitestone Bridge, between the George Washington Bridge Bus Station in Manhattan and other points in Manhattan and the Bronx on the one hand and on the other Kennedy and La Guardia Airports (collectively).

The third was a route which from December 13, 1965 to November 5, 1967 required Carey to carry the public by means of the Verrazano-Narrows Bridge between points in Richmond and Brooklyn and Kennedy Airport.

Each of the three above routes was established by city franchise which required Carey to transport the public between the points indicated and to use facilities designated, namely, the Queens Midtown Tunnel, Bronx-Whitestone Bridge and the Verrazano-Narrows Bridge, respectively.

The defendant Triborough Bridge and Tunnel Authority is a public benefit corporation organized pursuant to article 3 of the Public Authorities Law and operates the Queens-Midtown Tunnel, Bronx-Whitestone Bridge, and the Verrazano-Narrows Bridge. In the operation and maintenance of these facilities it has the power to promulgate reasonable rules and regulations concerning the use of the facilities by vehicles and to establish and collect tolls from vehicles using these facilities.



By letter dated April 28, 1939 the Triborough Bridge Authority granted a permit to North Shore Bus Co. Inc., to use the Bronx-Whitestone Bridge at a toll rate of $.25 per vehicle.

Effective May 1, 1962 the Authority amended its rules and regulations by establishing a toll rate of $.25 per vehicle for the use of the *Midtown Tunnel* and the *Bronx-Whitestone Bridge* by "franchise buses where authorized" and a higher rate of $.50 per vehicle for buses other than franchise buses. Carey buses were authorized franchised buses.

*As of August 2, 1962* the Authority amended its rules and regulations to provide that the toll rate for the Whitestone Bridge and Midtown Tunnel of $.25 shall apply to "two axle franchise buses engaged in general transportation, where authorized." At the same time it also established a specific exclusion from the general classification of "franchise buses engaged in general transportation", by providing that this classification did not include airline buses or other special purpose buses using franchised routes, which buses were required to pay a charge of $.50 to use those facilities. Carey buses, though franchised, two-axle buses, engaged in transporting the public, were therefore required to pay a toll of $.50 for each vehicle using these Authority facilities, whereas a franchised bus of two axles, performing general transportation functions, according to the Authority's definition, was only required to pay $.25.

As of April 15, 1963 the Authority amended its rules and regulations with respect to the Verrazano-Narrows Bridge by providing that a franchised two-axle bus engaged in general transportation pay a toll of $.50 and specifically excluded airline buses or other special purpose buses using franchised routes which were required to pay $1 to use the facility. This, of course, required Carey buses to pay $1 to use this facility.

Carey by letters dated August 17, 1964 and January 11, 1966 demanded refunds of the alleged excess tolls paid, and notified the Authority that future tolls were being paid under protest.

It is Carey's contention that the application to its buses of the higher rates indicated, even though it is a public transportation company required by franchise to use certain facilities and to carry the public between certain designated points, is arbitrary, unreasonable and unconstitutional. Carey therefore seeks a declaration from the court that the higher tolls imposed on Carey are illegal, arbitrary, unreasonable, discriminatory and unconstitutional and an injunction restraining the Authority from collecting any tolls in excess of those found to be legally applicable. In its second cause of action, it seeks damages in the sum of $380,000, with interest, that is the amount of tolls collected from Carey between August 17, 1964 and December 31, 1971 in excess of the claimed legal tolls. Carey has also reserved the right to claim damages to the date of judgment if successful on the first cause of action. By stipulation, the parties agree that the question of damages is to be held in abeyance until after the decision is rendered upon the first cause of action.



Counsel have submitted a stipulation as to the facts and excellent memoranda of law which have been carefully considered by the court.

It is the court's opinion and it finds that the toll rates required to be paid by Carey during the periods involved herein of $.50 per vehicle as to the Midtown Tunnel and the Whitestone Bridge and the toll of $1 per vehicle as to the Verrazano Bridge were illegal tolls and were unconstitutionally imposed. It is the court's opinion that the proper legal tolls which should have been imposed are $.25 and $.50 respectively.

The Authority was authorized to fix toll rates applicable to vehicles using its facilities. No guidelines or standards were set up by the Legislature as to the fixation of tolls other than the right to do so. In fixing the toll rates, the Authority was required to do so based upon reasonable classification of the vehicles using its facilities. Where classifications are made, however, with different tolls applying to each classification, the distinction between the vehicles classified resulting in the different tolls must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed (*Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417). In this case, in the court's opinion, the Authority has failed to comply with this rule of law.

In fixing the toll rates for the use of its facilities mentioned herein, the Authority has made a distinction between "franchise buses engaged in general transportation where authorized" and "air line buses and other special interest purpose buses which may use franchised routes". As to franchised buses engaged in general transportation, the Authority has fixed a lower toll rate than that fixed for

airline bus (Carey) and other special interest purpose buses which may use franchise routes. The lower toll rate fixed for the Midtown Tunnel and Whitestone Bridge was $.25 and for the Verrazano Bridge $.50. The higher toll rate charged to Carey buses was $.50 for the Tunnel and Whitestone and $1 for the Verrazano Bridge. These rates are, as the court understands, still in effect.

Carey buses, in the court's opinion, are franchised two-axle buses engaged in general transportation.

It is the contention of the Authority that its passage of the classification and fixation of toll rates mentioned above is not only entitled to great weight but is binding on the court. The court disagrees with this contention. The Authority is not the Legislature and it has only the power and discretion granted to it by the Legislature. It is not a policy making body and, in the court's opinion, its rates and regulations are binding on the court only when found to be legally effective.

The Authority was created to maintain and operate its facilities. It therefore had the power to impose reasonable tolls for the use of its facilities, to provide funds for the maintenance and upkeep of its facilities and to pay the interest and principal on its outstanding obligations. It had no legal interest in what a bus did after it passed through or over its facility. It was not created to control traffic or to provide for the transportation of persons using buses outside the confines of the facilities involved. Whether or not a Carey bus picked up passengers in Manhattan or Queens on its way to La Guardia or Kennedy Airport or on its return therefrom was no concern of the Authority. Nor was it in any way related to the operation of the



facilities involved. Therefore, in the court's opinion, the distinction made by the Authority in fixing the toll classifications between general transportation two-axled franchised buses which picked up and discharged passengers at designated bus stops along its route, and general transportation franchised two-axled buses of Carey's which took on the public as passengers at its terminal, passed through or over the facility of the Authority and made no stops until it arrived at its destination, is an arbitrary, unreasonable discrimination and an unconstitutional one (*Southern Ry. Co.* v. *Greene,* 216 U. S. 400, *supra; Smith* v. *Cahoon,* 283 U. S. 553, 566, 567; *Gulf Col. & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 153, 155; *Matter of Small* v. *Moss,* 279 N. Y. 288, 292, 298).

Judgment is therefore granted to the plaintiff on the first cause of action declaring that (a) the franchise bus toll rates of the Authority facilities (lower toll rates) are applicable to the Carey two-axle franchise buses traversing the facilities involved herein pursuant to the franchise contracts and the June 11, 1965 resolution in extension thereof, and (b) the Authority's refusal to so apply the said franchise bus toll lower rates to Carey is illegal, arbitrary, unreasonable, discriminatory and unconstitutional.

It is further declared that the Authority is permanently enjoined and restrained from imposing or collecting or attempting to impose or collect tolls from Carey for the use by Carey two-axle franchised buses of the Authority facilities involved herein at rates in excess of the toll rates of said facilities for use thereof by two-axle franchise buses engaged in general transportation, where authorized.

Pursuant to the stipulation of the parties herein, the second cause of action for damages is held in abeyance.

## Appendix B

### Judgment on Remittitur

At a Special Term, Part I of the Supreme Court, New York County, held in and for the County of New York at the Courthouse located at 60 Centre Street, New York, New York on the 16 day of March, 1976.

Index No. 2374/72

CAREY TRANSPORTATION, INC.,

*Plaintiff,*

*against*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Defendant.*

Present: Hon. ARNOLD L. FEIN, Justice

The above-named defendant, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY having appealed to the Court of Appeals from the order of affirmance of the Appellate Division of this Court, First Department entered on the 11th day of February 1975, in the office of the Clerk of such Court, which affirmed the interlocutory judgment of this Court entered on May 28, 1974 in favor of the plaintiff and

the final judgment of this Court entered October 25, 1974 in favor of the plaintiff in the amount of $677,450.58 plus other relief, and the Court of Appeals having heard arguments on said appeal on November 20, 1975 and after due deliberation having ordered and adjudged that the order so appealed from the Appellate Division be reversed, the orders and judgments of the Supreme Court, New York County be vacated and set aside, that judgment be granted in favor of the defendant, with costs in all Courts to defendant, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, and having further ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County on January 27, 1976 and having been read:

NOW, on motion of JOSEPH BULGATZ, Esq. Counsel for Triborough Bridge and Tunnel Authority, it is

ORDERED AND ADJUDGED that the order and judgment of the Court of Appeals be, and the same hereby are, made the judgment of this Court, and that the order of affirmance entered herein by the Appellate Division of the Supreme Court, First Department, on February 11, 1975 be, and the same hereby is, reversed; and it is further

ORDERED AND ADJUDGED that the interlocutory judgment of the Supreme Court, New York County entered in favor of the plaintiff on May 28, 1974 and the final judgment of the Supreme Court, New York County entered in favor of



the plaintiff in the amount of $677,450.58 plus other relief, be, and the same hereby are, vacated and set aside; and it is further

ORDERED AND ADJUDGED that the complaint and supplements thereto in the above entitled action be, and the same hereby are, dismissed; and it is further

ORDERED, that judgment be, and the same hereby is, granted in favor of defendant, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY and it is further

ORDERED AND ADJUDGED that the tolls and charges set and collected by Triborough Bridge and Tunnel Authority as it applied to CAREY TRANSPORTATION, INC., be and the same hereby are declared to have been and are valid.

ORDERED AND ADJUDGED that costs in all Courts be and the same hereby are, taxed against plaintiff, CAREY TRANSPORTATION, INC., in the amount of $2,506 10/100, in accordance with the Bill of Costs hereto attached.

ENTER,

/s/ ALF

Justice of the Supreme Court
New York County

NORMAN GOODMAN
Clerk

FILED
Mar 16 1976
New York
Co. Clerk's Office

**Order Amending Remittitur**

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of May A. D. 1976

Present, Hon. CHARLES D. BREITEL, *Chief Judge, presiding.*

1 Mo. No. 358

CAREY TRANSPORTATION, INC.,
*Respondent,*

*vs.*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,
*Appellant.*

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:



*Appendix B—Order Amending Remittitur*

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the toll rates established by the Triborough Bridge and Tunnel Authority, as applied to Carey Transportation, Inc., were invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, in passing upon this contention, held that the toll rates, as so construed and applied, were constitutionally valid.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa
Clerk of the Court

Supreme Court, U. S.
FILED
JUL 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

25-

No. 1788

CAREY TRANSPORTATION, INC.,

*Petitioner,*

*against*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE WRIT | 2 |
| CONCLUSION | 5 |


### Cases Cited


| | |
|---|---|
| Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) | 4 |
| Whitus v. Georgia, 385 U.S. 45 (1966) | 5 |


### Rule Cited


| | |
|---|---|
| Rule 19 | 2, 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 1788**

CAREY TRANSPORTATION, INC.,

*Petitioner,*

*against*

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted by respondent Triborough Bridge and Tunnel Authority ("Authority") in opposition to the petition of Carey Transportation, Inc. ("Carey") for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York rendered on January 15, 1976 and entered on March 16, 1976 in the Office of the Clerk of New York County.

## Statement of the Case

The petitioner's Statement of the Case, in discussing the decision of the Court of Appeals, omitted pointing out that the majority also found that the Authority did not violate any principles of classification.

## Reasons for Denying the Writ

In its effort to persuade that this case involves the "special and important reasons" which Rule 19 of the Supreme Court Rules makes the touchstone for determining whether certiorari is to be granted, petitioner attacks one part of the decision of the New York State Court of Appeals' decision, but ignores the balance. Singled out as the target is that part of the opinion which offers "the proposition that the Authority when acting in its toll-fixing capacity is to act much like an entrepreneur might, letting economic forces and the maximizing of profit be at least in part its guide." (Petitioner's Appendix, p. A9) But the court below did not base its decision solely on that proposition. Rather, it put that proposition aside and tested the Authority's toll rates by general principles of classification. Its conclusion was that "Assuming that somehow the Authority's power to set and collect rates must be exercised on some uniform basis within classes of users of its facilities, the Authority has not violated any principles of classification." (Petitioner's Appendix, p. A9) That conclusion was reached by the court below after analyzing the distinguishing features of the two classes of buses involved and noting that the City of New York also distinguishes between the two classes when charging franchise fees for the use of its streets. (Petitioner's Appendix, pp. A9-10)

This is not surprising, for the court posited, as the issue before it



> "* * * whether the Authority in the operation of its facilities may fix tolls and charges which in its judgment will best serve its economic goals and public policy goals, including economic differentiation among its charges so long as there is not involved any of the invidious discriminations condemned by statute or Constitution, or some utterly arbitrary discrimination not related to economic considerations or some accepted public goal." (Petitioner's Appendix, p. A4)

Elsewhere, the court noted that the Authority's discretion to fix tolls is limited in that it cannot practice "invidious illicit discriminations" and its "differentials are not utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them." (Petitioner's Appendix, p. A9

That petitioner perceives the true basis of the court's decision appears on pages 8-9 of its petition where the majority opinion is described as attributing to the Authority the status of a tax collector. That passing reference and the suggestion of distinctions between taxes and tolls does injustice to an important part of the decision in which the court observes that even if the toll rate classification must be tested by principles applicable to taxation, it proves valid. (Petitioner's Appendix, p. A7) That part of the court's decision which discusses what petitioner labels the "entrepreneurial standard," then, is superfluous since the toll rate classification was found valid even when measured against the more rigorous standards applied to tax classification.

Since the decision of the court below can be sustained completely on its finding that the toll rates applied did not violate principles of classification, it is not necessary for the United States Supreme Court to take up the ques-

tion of whether toll agencies are subject to entrepreneurial standards which may be different from those applicable to state agencies.

"Special and important reasons" is illustrated in Rule 19 as "where a state court has decide a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." The phrase has been held to "imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955).

Tested by that clarification, the decision below that a certain bus toll rate did not violate principles of classification cannot be said to present special and important reasons for review by the United States Supreme Court.

Nor is the decision below likely to have the national impact which petitioner foresees. (Petition, p. 8) The case itself primarily involves the use by petitioner's two-axlye buses of only one of the Authority's facilities. (Petition, p. 3, footnote) A recent inquiry addressed to the International Bridge, Tunnel and Turnpike Association, representing some 61 toll agencies in this country operating 157 facilities, disclosed that none of its members other than the Authority classified franchise buses for toll rate purposes according to the special/general distinction employed by the Authority.

Furthermore, the New York State Court of Appeals decided that the Authority's toll rate classification was consistent with applicable principles only after making a number of findings of fact which, if not conclusive as to the United States Supreme Court, are entitled to great



weight. The Court of Appeals found, for example, that the "special purpose" buses are not vehicles in mass transportation simply to move passengers between their homes and places of work, visiting or shopping; that the "general purpose" buses are forms of mass transportation from place to place in the course of daily life, usually regardless of the purpose of the passengers, and that the City of New York, in charging private bus lines franchise fees imposes different charges for the two classes. These findings of fact by the highest court of the State of New York are entitled to great respect although the United States Supreme Court is not, of course, precluded from making an independent inquiry. *Whitus* v. *Georgia,* 385 U.S. 45 (1966). Given the nature of the record and the character of these findings, however, it would seem unlikely that the United States Supreme Court would be inclined to substitute its judgment for that of the New York State Court of Appeals as to the nature of the services provided by the two kinds of bus operators.

## CONCLUSION

**It is respectfully submitted that the petition for writ of certiorari should be denied.**

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